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IN THE

Supreme Court of the United States

CAREN CRONK THOMAS AND WINDY CITY HEMP DEVELOPMENT BOARD,
Petitioners,

v.

CHICAGO PARK DISTRICT,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF *AMICUS CURIAE* INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE

The International Municipal Lawyers Association ("IMLA"), as amicus curiae, files this brief in support of the Respondent, the Chicago Park District.[1]

IMLA is a nonprofit, nonpartisan professional organization consisting of more than 1,400 members. The membership is comprised of local government entities, including cities and counties, and subdivisions thereof, as represented by their chief legal officers; state municipal leagues; and individual attorneys who represent municipalities, counties, and other local government entities. IMLA, previously known as the National Institute of Municipal Law Officers, has provided services and educational programs to local governments and their attorneys since 1935. IMLA is the oldest and largest association of attorneys representing United States municipalities, counties, and special districts.

Since its establishment, IMLA has advocated for the rights and privileges of local governments, and the attorneys who represent them, through its Legal Advocacy Program. Specifically, the Legal Advocacy Program of IMLA serves the membership by advocating the nationwide interests, positions, and views of local governments on legal issues.

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[1] Pursuant to this Court's Rule 37.2(a), letters of consent from both parties to the filing of this brief have been filed with the Clerk. Pursuant to this Court's Rule 37.6, the amicus curiae represents that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than the amicus curiae, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

IMLA has appeared as an amicus curiae on behalf of its members before the United States Supreme Court, in the United States Courts of Appeals, and in state supreme and appellate courts.

IMLA's specific interest in this case lies in the impact that this Court's ruling will have on local governments throughout the United States. Local governments throughout the United States, whether they are special districts, like the Chicago Park District, cities, or counties, process multiple requests for the use of public property every week, sometimes daily. These permitting processes require significant resources in terms of manpower and finances. This Court's decision will, therefore, greatly affect the manner in which local governments on a national level will be able to effectively manage these spaces. IMLA, as an organization promoting legal issues on behalf of local governments, therefore, files this brief on behalf of its members nationwide.

SUMMARY OF THE ARGUMENT

Content-neutral time, place and manner regulations not equivalent to prior restraints and should not be analyzed under either *Freedman v. Maryland*, 380 U.S. 51 (1965) or *FW/PBS v. City of Dallas*, 493 U.S. 215 (1990). Content-neutral time, place, and manner regulations of public fora have long been recognized by this Court as valid exercises of local government authority. When the discretion of local government authorities is properly curtailed by the terms of content-neutral time, place and manner regulations, the burden of challenging the regulations properly falls on those citizens seeking to invalidate the regulations. To hold

otherwise would be to require local governments to relinquish all control over public fora, to the detriment of society as a whole.

ARGUMENT

I. RECONCILING TWO CONFLICTING RIGHTS OF THE AMERICAN CITIZENRY THROUGH PROPER PUBLIC FORA REGULATION ANALYSIS

This Court again faces the question of reconciling the interests of the citizenry in the exercise and expression of First Amendment rights in public places with the interests of the citizenry in local governments' authority to protect the public peace and the use of streets and parks. The Petitioners have framed the question in terms of unpopular political speakers at odds with bureaucratic governments, which will impose so many obstacles that many of the political speakers will be silenced. Pet. Brief at 11. However, the permitting scheme in this case, like the permitting ordinances of a host of local governments throughout the United States, does not present a question as posed by the Petitioners. Framing the question in terms of an oppressed citizenry attempting to express political views against an opposing government bureaucracy oversimplifies the issues, prevents a true examination of the issues in this case, and prevents an adequate examination of the effect this case will have on local governments' ability to ensure just, fair, and orderly use of public fora in the United States.

The simple question before the Court asks how local government regulations of public spaces should be evaluated.

Does First Amendment analysis in the context of quintessential public fora involve two distinct theories (content-neutral, time, place, and manner analysis and prior restraint analysis) or only one theory (prior restraint analysis)? To histrionically frame the question in the Petitioners' terms - those of an abused citizenry against a tyrannical government - dictates the answer and prevents an adequate analysis. Properly framing the question, reviewing this Court's precedent, and truly evaluating the interests at stake, mandates the conclusion that First Amendment analysis of regulations governing public fora consists of two distinct legal theories which are mutually exclusive and depend on the terms and application of the regulation. Proper framing allows the various and potentially conflicting rights of all the American citizenry to be adequately, effectively, and correctly reconciled and protected.

A. Content-Neutral Time, Place and Manner Regulation Differ *Toto Coelo* From Prior Restraints

Content-neutral time, place and manner regulations differ in critical respects from prior restraints. Prior restraints by definition present the danger of allowing the government to censor speech. Content-neutral time, place and manner regulations, on the other hand, do not present the danger of censorship because they are not directed at speech or viewpoint, rather they are directed at the public places where speech occurs.

1. *Cox v. New Hampshire* - This Court's Controlling Content-Neutral Time, Place and Manner Precedent

This Court has long recognized the authority of local governments to regulate public fora for the safety and convenience of their citizenry. In addition, this Court has not found this authority to be inconsistent with First Amendment protections, but rather, has held this authority to be necessary to the orderly conduct of a civilized society in which the rights of *all* citizens are protected. In *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941) - the premier content-neutral time, place, and manner permitting case, directly on point and wholly ignored by the Petitioners - this Court stated

> [t]he authority of a municipality to impose restrictions in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend.

The *Cox* case involved the conviction of Jehovah's Witnesses for marching and carrying signs on a public sidewalk without a permit. *Cox*, 312 U.S. at 572. A New Hampshire state law required that individuals engaging in such activity obtain a license from local authorities to conduct such a demonstration. *Cox*, 312 U.S. at 573. This Court found the statute at issue to be a *constitutional and traditional* exercise of authority and control by local

government over public space which had been "immemorially" associated with communication. *Cox*, 312 U.S. at 574-75.

The *Cox* regulation allowed the government to prevent confusion which could be caused by possible overlapping parades, to secure reasonable use of the streets by other travelers, and to minimize the risk of disorder through the conditioning or change of the application in terms of time, place, and manner. *Cox*, 312 U.S. at 576. According to this Court, local governments could not be denied the authority to dictate the time, place, and manner of proper uses of the streets, provided they exercised this control without discrimination. *Cox*, 312 U.S. at 576.

This Court specifically distinguished several cases wherein local government ordinances had been held unconstitutional. This Court noted that those cases involved local government officials' use of *unfettered* discretion to determine:

- what activities could be engaged in (*Schneider v. Irvington*, 308 U.S. 147 (1939) and *Cantwell v. Connecticut*, 310 U.S. 296 (1939)),
- what literature could be distributed (*Lovell v. Griffin*, 303 U.S. 444 (1937)), or
- what constituted peaceful picketing (*Thornton v. Alabama*, 310 U.S. 88 (1939) and *Carlson v. California*, 310 U.S. 106 (1939)).

Cox at 577-78.

Unlike those cases, the *Cox* statute did not involve a restraint on the *freedom of speech* nor the use of unfettered discretion, but rather, the *exercise of local control over the use of streets* for parades and processions. *Cox* at 578. This Court's decision was made with no reference to any obligation of the local government to affirmatively go to court to obtain a judicial decision, much less any reference that the local government must assure a judicial decision be "promptly" forthcoming.

In fact, this Court did not invoke prior or previous restraint analysis at all, even though it had previously used these concepts when deciding other cases. See *Cantwell v. State of Connecticut*, 310 U.S. 296 (1940); *Lovell v. Griffin*, 303 U.S. 444 (1937). Rather, this Court wrote purely in terms of content-neutral time, place and manner regulation. Because this Court understood "prior restraint" or "previous restraint" theory at the time it decided *Cox*, it cannot be assumed that the landscape somehow changed with *Freedman v. Maryland*, 380 U.S. 51 (1965).

2. This Court's Content-Neutral Time, Place and Manner Analysis Before and After *Cox*

The Court's decision in *Cox* is not the only decision providing guidance as to how this case should be decided. In fact, a year earlier, in *Cantwell v. State of Connecticut*, 310 U.S. 296, 305 (1940), this Court wrote that a general regulation in the public interest, *did not* "constitute a prohibited previous restraint" on First Amendment activity. That statement alone should end the inquiry in this case. However, there are additional precedents which support the

ability of local government to regulate public fora without having to comply with the requirements set forth in *Freedman*.

In *Niemotko v. Maryland*, 340 U.S. 268, 279 (1951), Justice Frankfurter noted that the "pioneer case" discussing speech in public fora was *Davis v. Massachusetts*, 167 U.S. 43 (1897). The *Davis* case upheld the right of local governments to require a permit be obtained by persons making a "public address" on public grounds. The petitioner in *Davis* argued that the ordinance was arbitrary and unreasonable because it vested discretion in the Mayor, but this Court disagreed and held that local government had the right to dictate the manner in which the public property may be used. *Davis*, 167 U.S. at 47. Justice Frankfurter, commenting on the *Davis* decision, noted that this Court "respected the finding that the ordinance was not directed against free speech, but was intended as a proper regulation of the use of public grounds." *Niemotko*, 340 U.S. at 279 (internal citation omitted). This Court's recognition of local governments' ability to regulate the time, place, and manner of speech, without the requirements of prompt judicial review or initiating court proceedings, extends back *more than one hundred years*.

Similarly, discussing *Hague v. C.I.O.* , 307 U.S. 147 (1939), - a case relied on by Petitioner - Justice Frankfurter explained that the holding of *Hague* was not that a city could not subject its parks and streets to reasonable regulation, but rather, that licensing officials could not be given *arbitrary power to suppress free expression*. *Niemotko*, 340 U.S. at 279. The *Hague* fact patterned is wholly different from this case and wholly different from the permitting scheme used

by the vast multitude of local governments today. Therefore, *Hague* is inapplicable to this case. Justice Frankfurter noted that *Cox* "made it clear that the United States Constitution does not deny localities the power to devise a licensing system if the exercise of discretion . . . is properly confined." *Niemotko*, 340 U.S. at 280. Justice Frankfurter did not suggest that any of the requirements urged on this Court by the Petitioner were necessary in the context of content-neutral time, place, and manner restrictions. As a matter of fact, he succinctly stated the very principle which should decide this case:

> **A licensing standard which gives an official authority to censor the content of a speech differs *toto coelo* from one limited by its terms, or by nondiscriminatory practice, to considerations of public safety and the like.**

Niemotko, 340 U.S. at 283 (emphasis added).

Because a content-neutral time, place and manner restriction differs *toto coelo* from a prior restraint, the two types of regulations should not be analyzed under the same First Amendment framework. The regulations at issue in this case, like the regulations of a multitude of local governments throughout the United States are limited by their terms to considerations of public safety, convenience, and the like. Therefore, as Justice Frankfurter stated, these regulations should not be treated as "censorship."

3. The Continued Vitality of *Cox*, *Niemotko* and Justice Frankfurter's Reasoning

A reference to more recent jurisprudence from this Court shows that this Court continues to recognize the distinction between content-neutral time, place, and manner restrictions and prior restraints. In *Hill v. Colorado*, 120 S. Ct. 2480 (2000), the Court upheld a statute that constituted an outright prohibition on certain modes of speech near health care facilities. The Supreme Court reviewed that statute as a content-neutral time, place, and manner regulation, specifically rejecting a prior restraint analysis.

This Court, echoing analysis used in *Cox* and *Niemotko*, held that the Colorado statute was constitutional because it did not regulate speech, but rather, regulated the *places* where some speech may occur. This Court emphasized that the Colorado statute did not place restrictions on the viewpoint or subject matter discussed by the speaker, but rather, "establishe[d] a minor place restriction" on a category of communications. *Hill*, 530 S.Ct. at 2491.

Similarly, the Chicago Park District's permitting scheme, like permitting schemes in use by local governments throughout the United States, addresses the time, place, and manner by which public demonstrations may be held. The permitting scheme does not make judgments as to the content of speech. Rather the scheme regulates the place where speech may occur.

4. The United States Constitution Does Not Require Local Governments To Bear the Burden of Seeking or Guaranteeing Judicial Review of Content-Neutral Time, Place and Manner Regulations

This Court's decision in *Poulus v. New Hampshire*, 345 U.S. 395 (1953), - a case again wholly ignored by the Petitioner - clearly answers the Petitioners' concern as to who should bear the burden of initiating and obtaining "prompt" judicial review in cases involving content-neutral time, place, and manner regulations. There, this Court stated that the principles of the First Amendment are not a promise to everyone with opinions or beliefs to express, that they may gather at any place and at any time for discussion. "It is a non sequitur to say that First Amendment rights may not be regulated . . . ." *Poulus*, 345 U.S. at 405. Justice Reed, writing for the Court, noted the Court's approval of reasonable, nondiscriminatory government regulations which preserve the peace, order and tranquility without deprivation of First Amendment guarantees. *Poulus*, 345 U.S. at 405.

Going further, Justice Reed acknowledged the burden created by placing the responsibility of the defense of First Amendment rights on the citizenry, but noted that this was necessary in an ordered society.

> [J]udicial correction of arbitrary refusal by administrators to perform official duties under valid laws is exulcerating and costly. But to allow applicants to proceed without the required permits to . . . hold public meetings without prior safety arraignments or to take unauthorized action is apt to

> cause breaches of the peace or create public dangers. The valid requirements of license are for the good of the applicants and the public."

Poulus, 345 U.S. at 409. Continuing, Justice Reed stated for this Court:

> Delay is unfortunate, but *the expense and annoyance of litigation is a price citizens must pay for life in an orderly society where the rights of the First Amendment have real and abiding meaning*."

Poulus, 345 U.S. at 409. (Emphasis added).

As can be seen from the above, not only is the permitting scheme in this case a constitutional content-neutral time, place and manner regulation, but requiring citizens rather than local governments, to initiate court proceedings is also constitutional and has been recognized as such for almost fifty years.

B. This Court's Prior Restraint Analysis is Wholly Inapplicable to this Case and to Content-Neutral Time, Place, and Manner Regulations

The Petitioners' reliance on this Court's prior restraint analysis is wholly misplaced because of the different factual nature of prior restraint cases from matters involving content-neutral time, place and manner regulations. In *Freedman*, the Supreme Court examined a Maryland motion picture *censorship* statute that required theaters submit films to a State Board of Censors and obtain a license before showing

the films, *based on the Board's decision regarding whether the film was obscene*. *Freedman*, 380 U.S. at 52. Therefore, it was up to the government to make a decision regarding the value of the speech involved. Unlike *Freedman*, this case and its permitting scheme, like the great multitude of permitting schemes throughout the United States, does not present the Court with a government regulation which allows the government to pass judgment on the value, viewpoint or content of the speech.

Similarly, *FW/PBS v. City of Dallas*, 493 U.S. 215 (1990) is distinguishable from this case. At the outset, Justice O'Connor noted that the petitioners had raised a facial challenge to Dallas' licensing scheme. *FW/PBS*, 493 U.S. at 223. Justice O'Connor further noted that facial challenges to licensing schemes are generally disfavored, except in the "First Amendment context where the licensing scheme vests unbridled discretion in the decision maker. . . ." *FW/PBS* 493 U.S. at 223. The unbridled discretion in *FW/PBS* arose in the failure of the Dallas ordinance to place time limits on the city in which to inspect sexually oriented businesses for compliance with health, fire and building codes. *FW/PBS* 493 U.S. at 227.

This case does not raise similar "unbridled discretion" concerns. The regulations in this case, like the regulations of local governments throughout the United States, are limited in terms of timing and provide standards to be used in denying permits. Therefore, these regulations should not be treated as prior restraints.

II. FAR-REACHING EFFECTS OF DETERMINING WHETHER CONTENT-NEUTRAL TIME, PLACE, AND MANNER REGULATIONS MUST COMPLY WITH *FREEDMAN*

This case has far-reaching effects beyond the Chicago Park District. Currently this Court has before it two petitions for certiorari involving virtually identical questions of law. *Cannabis Action Network, Inc. v. City of Gainesville*, 231 F.3d 761 (11th Cir. 2000), *petition for cert. filed*, 69 U.S.L.W. 3657 (U.S. March 29, 2001) ((No. 00-1503) and *MacDonald v. City of Chicago*, 243 F.3d 1021 (7th Cir. 2001), *petition for cert. filed*, 69 U.S.L.W. 3791 (U.S. March 29, 2001) (No. 00-1839). In addition to those cases, various courts throughout the United States, but especially in the Eleventh Circuit, are poised to invalidated countless content-neutral time, place, and manner regulations which were conscientiously enacted by local government officials in an attempt to provide for peace and order in public spaces. For example, since the Eleventh Circuit's decision in the *Gainesville* case, the City of Jacksonville, Florida and the City of Daytona Beach, Florida have each had content neutral regulations invalidated on the basis that local governments must comply with *Freedman* when enacting content-neutral time, place and manner regulations. *Florida Cannabis Action Network, Inc. v. City of Jacksonville*, Case No. 3:00cv544-J-20TJC (M.D. Fla. March 1, 2001), and *Red-Eyed Jack, Inc., v. City of Daytona Beach*, Case No. 6:01-cv-429-orl-28 KRS (M.D. Fla. July 24, 2001).

Were this Court to hold that such regulations, even though they be content-neutral time, place, and manner

regulations, are subject to prior restraint analysis and the requirements enumerated in *Freedman*, local governments would lose all ability to control public spaces. Local governments already suffer from too few resources, whether in terms of personnel or money. To require that before they may deny permits to gather for First Amendment activities, local governments must affirmatively go to court and must guarantee a prompt judicial decision on their denial of a permit, would be to insist on the impossible. As this Court noted, the expense of challenging content-neutral time, place and manner regulations which apply equally to all segments of society is a price to be borne by the citizens challenging the regulations. Society as a whole would suffer were it otherwise, both in terms of additional financial and resource burdens assumed by already overburdened local governments and in terms of an inability by society generally to freely enjoy public fora because those spaces would suddenly be wholly unregulated.

For example, many localities, especially larger urban localities, would be faced with competing requests for the use of public fora, and quite likely while one denial is being litigated, no matter how quickly, other requests for the same time and place would invariably be submitted. Local governments will then find themselves in the unenviable position of having multiple ongoing litigations in progress because they cannot simply say, "We're sorry, but that space is already in use for another purpose." This is true regardless of whether the space is a park previously committed to other activities (be they First Amendment or otherwise) or whether the space is a public street at rush hour on a Friday afternoon. Prior restraint analysis is simply unworkable in the context of content-neutral time, place and manner regulations which do

not allow for unfettered exercise of discretion by public officials. The analysis the Court has engaged in since the *Davis* case in 1897, and which the Court has repeatedly invoked in varying circumstances over the hundred years since then, does provide a workable standard, however: Content-neutral time, place, and manner regulations adequately protect all segments of society, as does requiring those challenging such regulations to bear the burden of going to court and awaiting a judicial decision.

CONCLUSION

For the foregoing reasons, the International Municipal Lawyers Association respectfully requests that this Court affirm the decision of the Seventh Circuit holding that content-neutral time, place, and manner regulations are not subject to prior restraint analysis or the requirements of *Freedman v. Maryland*, 380 U.S. 51 (1965).

Respectfully submitted,

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